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RECORD OF ORAL HEARING
UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAMES R. GROSS, BRIAN E. BOEHMER,
JOHN P. ERSPAMER, and JOHN PERRY BAKER

Appeal 2008-002545
Application 09/774,248
Technology Center 3700

Oral Hearing Held: Thursday, October 22, 2009

Before DEMETRA MILLS, MELANIE L. MCCOLLUM and STEPHEN G. WALSH, *Administrative Patent Judges*.

ON BEHALF OF THE APPELLANTS:

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The above-entitled matter came on for hearing on Thursday, October 22, 2009, commencing at 9:19 a.m., at the U.S. Patent and Trademark Office, 600 Dulany Street, 9th Floor, Hearing Room B, Alexandria, Virginia, before Kevin Carr, Notary Public.

1 THE USHER: Good morning. Calendar Number 61, Mrs. Lee.

2 JUDGE MILLS : Good morning, Mrs. Lee.

3 MRS. LEE: Good morning.

4 JUDGE MILLS: Can you get settled, and when you are settled, you'll
5 have 20 minutes and you can begin when you're ready. And we are familiar
6 with the issues in this case, and if you'd like to particularly focus your
7 comments on where you believe the controversy is, that would be helpful to
8 us.

9 MRS. LEE: Okay. Is the Examiner joining us this morning?

10 JUDGE MILLS: I was not indicated that that was going to happen.
11 Those individuals weren't with you.

12 MRS. LEE: No. No, I wasn't sure if she was.

13 JUDGE MILLS: They are welcome to come in if you have the
14 inventor, or whoever.

15 MRS. LEE: Oh, no. No, just myself.

16 JUDGE MILLS: Okay.

17 MRS. LEE: I can barely see everyone.

18 JUDGE MILLS: Oh, I know.

19 MRS. LEE: Well, I'll begin. My name is Sandra Lee. I am here on
20 behalf of BKI Technologies, which is the same as Buckeye Technologies. I
21 am the attorney of record, and I am from Baker Botts in the New York
22 office. As you mentioned already, I assume everyone is familiar with the
23 case that we're talking about. And the main points that I'd like to raise today
24 are the designations of the layers between our claimed invention and what's
25 disclosed in Hammonds, which is the primary reference being used against
26 us. So, with respect to our invention, if I could just spend a couple of

1 minutes to make sure that we're all clear on what the claimed embodiments
2 are, primarily we're looking at claims 1 and 12, which are the independent
3 claims.

4 Our invention is directed to an absorbent article which contains an
5 absorbent core. Now, the absorbent core contains three layers, the first one
6 being an acquisition layer, the second one being a storage layer, and a third
7 one being a wicking layer. Although we have multiple components, our
8 focus for this particular invention is on the wicking layer. In claim 12 we
9 also have the inclusion of a top sheet, which is moisture permeable, as well
10 as a moisture impermeable bulb back sheet, which is disposed beneath the
11 wicking layer.

12 JUDGE MCCOLLUM: Is there a particular figure in the specification
13 that you should point to? Figure 1 is -- ?

14 MRS. LEE: Of course. Figure 1 is a cross-section. Figure 1 includes
15 a top layer as well as a bottom layer. Excuse me, the back sheet and the
16 top sheet and the back sheet . So if you're looking at Figure 1, item
17 number 10 -- I'm not sure how good your copy is .

18 JUDGE MCCOLLUM: It's a little fuzzy, but --

19 MRS. LEE: Okay. Item 10 is designated the top sheet, which has the
20 diagonals going from 1 to the 7, let's say. The second layer is our
21 acquisition layer, designated number 11. Third is the storage layer which is
22 designated 12, which in Figure 1 is the largest layer. The next item is the
23 wicking layer, which is item 13; and, lastly, the moisture-impermeable back
24 sheet is item number 14, which is on the bottom. To the left side of Figure 1
25 you have a section drawn out to be 15. Fifteen is what we are terming the

1 absorbent core. Fifteen is inclusive of the acquisition layer, storage layer,
2 and wicking layer.

3 JUDGE MCCOLLUM: Okay. Thank you.

4 MRS. LEE: Of course. Of course. Now in terms of the functionality
5 of the different layers, I think it's important to point out a few points. With
6 respect to the focus on the absorbent core, the three components in the
7 middle, our acquisition layer is the layer which efficiently collects the fluid
8 and temporarily holds the fluids there while it passes and transports it along
9 to the storage layer.

10 JUDGE MCCOLLUM: Does the specification define the term that
11 way?

12 MRS. LEE: Yes. Yes, I can actually give you the citation for that. If
13 you look at -- I guess I have a copy of the published application here.

14 JUDGE MCCOLLUM: Okay. That's not what we have before us, but
15 --

16 MRS. LEE: That's okay, because I can go and refer to the Appeal
17 Brief, which will also indicate. So I can give you the actual page numbers as
18 well. So the overall structure, I believe, is discussed on pages of the
19 specification, pages 13 and 14. I apologize. I did not have a copy of the
20 application as filed. The language that I am looking at specifically -- I don't
21 know if you want to make note of this or not, but, in the published
22 application it's paragraph 84, just as a cross-reference point. Midway
23 through the paragraph it indicates that "The acquisition layer, number 11,
24 functions to quickly collect and temporarily hold bodily fluids that have
25 been deposited thereon and which have been transversed through the top
26 sheet, 10.

1 Additionally, the acquisition layer functions to transport those bodily
2 fluids to the underlying storage layer. So that is the functionality of that
3 particular layer. With respect to the storage layer, which is the next layer in
4 the absorbent core, we're looking at the function which receives and
5 ultimately contains the bodily fluids after coming through the acquisition
6 sheet.

7 JUDGE WALSH: I have a question for you as you're going over
8 these terms.

9 MRS. LEE: Of course.

10 JUDGE WALSH: In the Examiner's Answer, the Examiner reminds
11 us that we shouldn't import limitations from the specification to the claims.
12 Now, I'm wondering if the specification has a limiting definition somewhere
13 where it says this is what acquisition layer must be; and, if there is such a
14 thing, that we look at that instead of using what is usually used in
15 prosecution: the broadest reasonable interpretation of a claimed term. The
16 Examiner seems to be coming from the view that anything that -- that
17 acquires liquid could be an acquisition layer for Claim 1 purposes. Could
18 you address that?

19 MRS. LEE: Absolutely. With respect to the disagreement on the
20 claim term reference of the different layers -- I think that's what you're
21 getting to -- the term in the claim is "acquisition layer"; is a term known in
22 the art. What I am reading to you from the specification is defined or
23 described in a particular way, which by the way Hammonds, the primary
24 reference cited against us, defines the same way. So using knowledge of one
25 skilled in the art, "acquisition layer", in the claim, has meaning in and of

1 itself, that is not inconsistent with how to use an art or how it's used in the
2 specification.

3 So with respect to looking to what the definition is of the acquisition
4 layer in the specification, it's our position that it's not any more limiting than
5 what would be recognized with the use of just the term "acquisition layer."
6 And, perhaps to that point, this might be a good opportunity if we briefly
7 look at the disclosure in Hammonds to see how Hammonds is defining
8 acquisition layer. Hammonds is U.S. Patent 5,647,863. If we look at
9 column 7, line 40, if you look at the second sentence beginning "The
10 acquisition number, designated item 44, is intended to quickly collect and
11 temporarily hold bodily discharges, particularly menses, deposited thereon
12 or which have transversed through the top sheet, item 38, and transport those
13 discharges to the underlying storage distribution, number --"

14 JUDGE MCCOLLUM: So let me ask you a question now.
15 Obviously, the Examiner, at least with regard to Claim 1 is considering
16 acquisition layer 44 to be the storage layer. Now, I guess where it says, right
17 here, it temporarily holds bodily discharges, so I guess the problem I'm
18 having is that's a storage layer. I mean, what is it about the way the claim
19 that makes -- that it can't be called a storage layer?

20 MRS. LEE: It only temporarily holds the fluid.

21 JUDGE MCCOLLUM: Okay.

22 MRS. LEE: In which case, both Hammonds and our specification
23 actually indicate and describe what a storage layer is, where it is the end-
24 resulting repository for the fluids that are there.

25 JUDGE MCCOLLUM: Now, remind me. In your invention does the
26 fluid move from 44 to the wicking layer at all?

1 MRS. LEE: In my invention?

2 JUDGE MCCOLLUM: In your client's invention.

3 MRS. LEE: No. No, I think the 44 number is Hammonds.

4 JUDGE MCCOLLUM: I'm sorry. Does it move from your storage
5 layer, which the Examiner is using; 40? Yeah, you're right. I did speak
6 incorrectly. Does the fluid move from the storage layer to the wicking layer,
7 or does it never go to the wicking layer?

8 MRS. LEE: In our invention, it does.

9 JUDGE MCCOLLUM: Right. So, isn't it temporarily being held in
10 the storage layer before moving to the wicking layer?

11 MRS. LEE: The wicking layer actually will pull a storage layer in,
12 pulling wicking -- I guess is the right term -- wicking the liquid down from
13 the storage layer, redistributing it back into the storage layer. So to the
14 extent that it is facilitating the distribution of the fluid across the storage
15 member, storage layer, yes. You are correct. It comes down through to the
16 wicking layer and passes back up.

17 JUDGE MCCOLLUM: Okay.

18 MRS. LEE: If you'd like a citation for that, I can provide that for you.

19 JUDGE MCCOLLUM: Well, I mean I guess what I think the
20 Examiner is having trouble with is to say that you really have to really finely
21 define the word storage to say that 44 is not a storage layer, because it does
22 temporarily hold something. In this particular art how long does it have to
23 store to be considered a storage layer? So it brings up the point you need a
24 very precise definition to try to say that that layer is not a storage layer,
25 because I think, and I'm not seeing really precise definitions in the spec that
26 clearly say you can't call this acquisition layer a storage layer.

1 MRS. LEE: I think that it's difficult in this art to necessarily take
2 meaning away from the claim terms as they are and I appreciate your point
3 that you're making. The fact that the acquisition layer temporarily holds
4 fluid, it's important to note that it also transports it thereafter. It doesn't stop
5 there. It transports it down to the storage layer, and both our specifications
6 describe that, as well as Hammonds, as well. Hammonds also has the same
7 description with respect to their storage layer, their acquisition layer and
8 their storage layer.

9 JUDGE MILLS: Did we have argument in the Brief that these were
10 terms of art and would necessarily have been understood in a particular way?

11 MRS. LEE: In the Appeal Brief, we certainly take issue with how the
12 Examiner is changing, I guess, the terminology of what layers are doing, not
13 only nominally, but also functionally. And I think in our Reply, answers
14 allow we address the fact in the Reply Brief that, actually, also in the Appeal
15 Brief we do talk about the fact that the layers that we are using are consistent
16 with the layers that Hammonds is using, in terms of terminology. So in
17 terms of making the argument that these are known in the art, that particular
18 statement, I'm not sure if we've included it in the Appeal Brief, but I am
19 fairly certain that it is described in that manner.

20 JUDGE MILLS: Okay. Well, if you can, get to the technical aspect
21 of the Hammonds layer, just how it doesn't coincide. I mean, I assume that's
22 your position, that the layers don't fall in line the same as yours do.

23 MRS. LEE: Not only do they not fall in line nominally, functionally,
24 they do not do the same thing either. That's our position. And we've
25 actually gone back and forth with the Examiner about that point. Even if we
26 appreciate her naming scheme, if you go beyond that and look at the

function, it's not correct. So when you're looking at Hammonds, if you're looking at a figure for ease of reference, we would direct you to Figure number 2 or 3 in Hammonds. They are both cross-sections of Hammonds' absorbent article. So according to Hammonds, item number 38 is his top sheet. It's a reserving at the top there.

The next layer is item 44, which is the acquisition layer. Following that, disposed beneath that, is item 46, which is what Hammond terms as a "storage/distribution layer." Below 46, Hammonds also has a back sheet. Now, flanked on the lateral size of the storage and partially on the acquisition layer are items 48. You'll see two 48s on each side in figure 2. These are lateral numbers. These are indicator layers.

JUDGE MCCOLLUM: You might want to talk a little bit about, or the Examiner seems to, at least with regard to Claim 1, call 46 and 47 the wicking layer.

MRS. LEE: 46 and 48.

JUDGE MCCOLLUM: 46 and 48.

MRS. LEE: Hm-hmm.

JUDGE MCCOLLUM: Thank you. Can you talk a little bit about why you think that's incorrect to do?

MRS. LEE: 46 and 48 relate to a storage/distribution member as well as the indicator side flanking members. And it's our position -- and actually we talk about Hammonds in the background of our application specification -- that if you take 48 and 46 together or apart, either way, neither of them serve as a separate wicking layer.

JUDGE MCCOLLUM: And what do you mean?

MRS. LEE: That it's disposed beneath the surface layer.

1 JUDGE MCCOLLUM: Well, what do you mean by they're not a
2 wicking layer? What is it? Because they seem to be made of similar
3 materials. They are pulp, as is your wicking layer. So why don't they
4 achieve the purpose of wicking?

5 MRS. LEE: 46 is the storage/distribution layer, which combines in
6 one-layer attributes of what we've separated out.

7 JUDGE MCCOLLUM: Hm-hmm.

8 MRS. LEE: They've combined the attribute to storing as well as
9 distributing across. The indicator members on the side, which she has cited
10 in terms of density, having similar density to our wicking layer, first and
11 foremost are not disposed beneath the storage layer as required by the
12 claims, structurally. Secondly, the indicator member only receives fluid
13 upon the absorbent storage layer reaching capacity, so that you have the blue
14 coloration, for example. So, unless the storage layer reaches capacity, the
15 indicator members will not receive fluid.

16 JUDGE MCCOLLUM: Okay. But in terms of that considering those
17 three things an entire layer, if you consider it an entire layer it is beneath.
18 And so, I guess what I'm trying to figure out is why just the label or wicking
19 layer excludes that from being one. If it wicks, is there something about it
20 such that it cannot wick? Because that's the word in the claim, and I am just
21 trying to --

22 MRS. LEE: So in the claim, if you look at the limitations of what we
23 require in our wicking layer, it requires a density, a relatively low density
24 range, which is .05 and .4 grams per cc, as well as being composed of
25 hardwood pulp and particular ratios with respect to the vertical wicking
26 height. The fact that we have a separate wicking layer of a lower density,

1 none of those three components individually are the same as our separate
2 low-density wicking layer.

3 At best, actually, if you align structurally and functionally -- if you
4 aligned up the products -- the closest thing in terms of density and not
5 placement, but if you're looking at the indicator member, well, we know that
6 that doesn't receive fluid until it's reached capacity, versus our layer which
7 pulls it out while the storage layer is being filled with fluid. It pulls it out,
8 actively assists it in redistributing across. These are very different in terms
9 of the structure and their function.

10 Forty-six together will comprise storage and distribution ability, but
11 what they failed to do is recognize that if you separate out those functions
12 into different layers you do have other added benefits. You know, one of the
13 features in our specification, the whole purpose behind the wicking layer is
14 to help distribute fluid in the storage layer or retain a certain level of softness
15 for the wearer, which is in the background of our application. The purpose
16 of the separate wicking layer is to fully use the storage layer without having
17 the negative properties of an entire layer combined.

18 JUDGE WALSH: In Claim 1, the wicking layer that's described in
19 part 3 of Claim 1, it has a certain wicking height; and, in your Brief, you've
20 argued that Hammonds doesn't provide a corresponding wicking height.
21 And in Claim 3, it says the ratio of the vertical wicking height of the wicking
22 layer to the vertical wicking height of the storage layer is equal to or greater
23 than 1.25.

24 MRS. LEE: Correct.

1 JUDGE WALSH: Do I understand that to mean that the wicking
2 height for the wicking layer is greater than the wicking height of the storage
3 layer?

4 MRS. LEE: It has to be at least the same or greater.

5 JUDGE WALSH: At least the same or greater.

6 MRS. LEE: Equal to or greater than 1.25. Right.

7 JUDGE WALSH: Okay. And you referred us to, I think, it was
8 column 11 of Hammonds where the wicking heights are discussed; and the
9 Examiners pointed to 46 of Hammond as the wicking layer, and it seems like
10 column 11 would support the idea that 46 of Hammond has a greater
11 wicking height than the other part. So why is that not consistent with the
12 way the claim is written?

13 MRS. LEE: It's not consistent because we are referring to the layers
14 differently.

15 JUDGE WALSH: Okay. So if we accept your designation and
16 terminology, then the Examiner must be wrong. On the other hand, if we
17 accept the Examiner's view that anything that has components that perform
18 these functions, the functionality type approach, then the Examiner is
19 probably right.

20 MRS. LEE: Actually, no. That's not correct. No, we are of the strong
21 position that an acquisition layer is not the same as a storage layer. That's a
22 huge difference for us in terms of acquisition layer, both Hammonds, and we
23 describe the acquisition layer consistently, as well as the top sheet. We both
24 describe the acquisition layer as being one that accepts the fluids,
25 temporarily holds it, has an important role to then transport it onto the
26 storage layer.

1 JUDGE WALSH: So, in your view, acquisition layer must mean
2 something that is described in your specification or in Hammonds'
3 disclosure, and the Examiner is making a mistake by saying the top sheet
4 acquires liquid and transfers the liquid to the layer below.

5 MRS. LEE: Yes, actually, there's one.

6 JUDGE WALSH: Is that -- ?

7 MRS. LEE: Yes, that's true. And, actually, that's a good distinction,
8 because the top sheet -- if we assume the Examiner's position is correct -- if
9 you assume that just by labeling the top sheet the acquisition sheet in
10 Hammonds, which the Examiner's position is, the top sheet has no capacity
11 to temporarily hold fluids to pass them on. Again, it's a term that is known
12 in the art, so the Examiner's indication that you can use a top sheet as an
13 acquisition sheet, we believe it's incorrect.

14 JUDGE MILLS: Okay. It looks like we are starting to get short on
15 time. Did you have any quick, additional comments about the other
16 rejection in the case, the rewetting?

17 MRS. LEE: No. We don't. No. We're really focusing on the appeal
18 with respect to how Hammonds is being used and applied.

19 JUDGE MILLS: Okay. Does anyone have any additional questions
20 here? I believe we understand your position with the case and we'll take it
21 under advisement.

22 MRS. LEE: Thank you very much for your time. I appreciate it.

23 (Whereupon, at 9:46 a.m., the proceedings were concluded.)
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26